

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY R. ALLEN,)	
)	
Plaintiff(s),)	No. C 08-4268 CRB (PR)
)	
vs.)	ORDER OF DISMISSAL
)	
DIRECTOR OF CORRECTIONS, et al.,)	
)	
Defendant(s).)	
_____)	

Plaintiff, a State of California prisoner incarcerated at the Correctional Training Facility in Soledad, has filed a pro se complaint under 42 U.S.C. § 1983 challenging the conditions of his confinement. He seeks injunctive and monetary relief. Plaintiff has not exhausted California's prison administrative process, however.

The Prison Litigation Reform Act of 1995 ("PLRA") amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Although once within the discretion of the district court, exhaustion in prisoner cases covered by § 1997e(a) is now mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). All

1 available remedies must now be exhausted; those remedies "need not meet
2 federal standards, nor must they be 'plain, speedy, and effective.'" Id. (citation
3 omitted). Even when the prisoner seeks relief not available in grievance
4 proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.;
5 Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a
6 prerequisite to all prisoner suits about prison life, whether they involve general
7 circumstances or particular episodes, and whether they allege excessive force or
8 some other wrong. Porter, 534 U.S. at 532. PLRA's exhaustion requirement
9 requires "proper exhaustion" of available administrative remedies. Woodford v.
10 Ngo, 126 S. Ct. 2378, 2382 (2006).

11 The State of California provides its prisoners the right to appeal
12 administratively "any departmental decision, action, condition or policy
13 perceived by those individuals as adversely affecting their welfare." Cal. Code
14 Regs. tit. 15, § 3084.1(a). It also provides them the right to file appeals alleging
15 misconduct by correctional officers/officials. Id. § 3084.1(e). In order to exhaust
16 available administrative remedies within this system, a prisoner must proceed
17 through several levels of appeal: (1) informal appeal, (2) first formal appeal on a
18 CDC 602 inmate appeal form, (3) second level appeal to the institution head or
19 designee, and (4) third level appeal to the Director of the California Department
20 of Corrections and Rehabilitation. Barry v. Ratelle, 985 F. Supp. 1235, 1237
21 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision from
22 the Director's level of review satisfies the exhaustion requirement under §
23 1997e(a). Id. at 1237-38.

24 Nonexhaustion under § 1997e(a) is an affirmative defense which should
25 be brought by defendant(s) in an unenumerated motion to dismiss under Federal
26 Rule of Civil Procedure 12 (b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.
27
28

2003). But a complaint may be dismissed by the court for failure to exhaust if a prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion applies.” Id. at 1120.

Here, plaintiff concedes he did not exhaust available administrative remedies through the Director’s level of review before filing suit, but suggests that the exhaustion requirement should be excused. Not so. The attachments to plaintiff’s complaint show that plaintiff received a first formal level response to his appeal on August 21, 2008, and that the response advised him that he could appeal to the second formal level within 15 days. Plaintiff instead filed suit in federal court. There is no indication of any extraordinary circumstance which might compel that he be excused from exhausting available administrative remedies through the final Director’s level of review. Cf. Booth, 532 U.S. at 741 n.6 (courts should not read “futility or other exceptions” into § 1997e(a)).

Accordingly, the complaint is DISMISSED without prejudice to refiling after exhausting California’s prison administrative process. See McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (action must be dismissed without prejudice unless prisoner exhausted available administrative remedies before he filed suit, even if prisoner fully exhausts while the suit is pending).

The clerk shall enter judgment in accordance with this order and close the file.

SO ORDERED.

DATED: Oct. 01, 2008



CHARLES R. BREYER
United States District Judge